FIRST APPEAL No.13 OF 1991

Against the Judgment and Decree dated 4.12.1990
passed by Sri Balmiki Prasad Sinha, Ist Sub-Judge,
Danapur, in Title Suit No.62 of 1988.

Sri Rajendra Mahto------Defendant-Appellant.

Versus

Sri Ram Nandan Singh & ors.—Plaintiff-respondents.

For the appellants:Sri Dhruv Narayan,Sr,Advocate.
SriJitendra Prasad Singh,Advocate.
Sri Abhishek.Advocate.
Sri P.K.Dipak,Advocate.
Sri Rajiv Kumar Sinha, Advocate.

For the respondents: Sri B.N.P.Sinha, Advocate.

Dated 5th August,2010

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P R E S E N T

THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

J U D G M E N T

Mungeshwar sahoo, J. The defendant appellant has filed this first appeal against the Judgment dated 4.12.1990 and the decree signed on 17.12.1990 by Sri Balmiki Prasad Sinha, the learned Ist Subordinate Judge, Danapur, in Title Suit No.62 of 1988 decreeing the plaintiff respondents' suit for specific performance.

2. The plaintiff respondents' case, in short, is that on 28.10.1985 the parties entered into an agreement for sale of

the suit property for a consideration amount of Rs.3,42,400/-. Rs.50,000/- was paid as earnest money and the balance consideration amount of Rs.2,92,400/- was to be paid at the time of registration of the sale deed. The sale deed was to be executed before 30.6.1986. It was stipulated that if the sale deed is not executed within the said period the plaintiff will have the right to file a suit for specific performance and if the plaintiff failed to get the sale deed executed within the stipulated period the amount of advance money shall stand forfeited. At the time of agreement the defendants assured the plaintiff that the land in question was free from all defects and encumbrances and the defendants have full title over the land in question.

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3. The further case of the plaintiff is that scribe was the man of defendants and the attesting witnesses were also men of the defendants. The plaintiff believing on the defendants without reading the agreement signed the same but subsequently he learnt that a litigation being Title Suit No.252 of 1985 was pending against the defendants regarding the suit property in the court of Sub Judge-II, Patna. Thereafter the plaintiff suspected some foul play and got the agreement read by his advocate and came to know that the defendant fraudulently got inserted a new term in the did of agreement to the effect that the plaintiff was to pay Rs.1,25,000/- within 30.1.1986 failing which advanced money has been forfeited. According to the plaintiff this term was never agreed upon. In such circumstance on 16.1.1986 the

plaintiff sent a legal notice asking the defendant to settle the dispute with his uncle in title suit pending between them and informed the plaintiff accordingly, so that the sale deed may be executed in favour of the plaintiff. The plaintiff again sent another legal notice on 16.6.1986 stating that they have balance consideration amount ready and again asked the defendants to settle the dispute with the plaintiff of Title Suit no.252 of 1985. But the defendants remained silent regarding the Title Suit No.252 of 1985. The plaintiff again sent another legal notice on 25.9.1986 making the same request. The plaintiff further stated that the defendants approached the plaintiff and assured that Title Suit No.252 of 1985 was going to be compromised but in spite of that the defendants kept silent and did not take any further action so again a notice was sent on 14.7.1987 informing the defendants that they are keeping ready the balance consideration amount and sought information regarding as to whether the dispute between the parties in Title Suit no.252 of 1985 had been settled or not. Surprisingly, the defendants sent a belated reply on 22.9.1987 making out a case that the plaintiff did not pay Rs.1,25,000/- on or before 30.1.1986 in spite of the demand, so, the advanced amount was forfeited and agreement of sale became inoperative. In the said notice falsely it was alleged that the plaintiff had no ready money and he did not obtain income tax clearance certificate and did not take steps under Ceiling Act and further did not furnish draft sale deed.

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4. The defendant appeared and filed W.S. The defendants admitted the execution of deed of agreement and receiving of earnest money of Rs.50,000/-. According to the defendants the plaintiff failed to make payment of Rs.1,25,5000/- on or before 30.1.1986. As such the plaintiff committed breach of contract. The plaintiff also neither obtained income tax clearance certificate nor paid Rs.1,25,000/- nor gave the draft sale deed.

5. Further defence is that the scribe and the attesting witnesses were the men of the plaintiff and the deed of agreement was written on the instruction of the plaintiff. The plaintiff personally read the agreement and also it was read over and explained by the scribe in presence of all the parties and then the plaintiff signed on the agreement. The further case is that the plaintiff had nothing to do with Title Suit No.252 of 1985. After enquiry and full satisfaction about the title of plaintiff entered into the agreement but the plaintiff with malafide intention and to put cover on their own negligence pleaded regarding pendency of the suit because they were never ready and willing to pay the balance amount. On these grounds the defendants prayed for dismissal of the suit.

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6. On the basis of these pleadings of the parties the learned court below framed the following issues:-

(i) Is the suit as framed maintainable ?

(ii) Have the plaintiff would cause of action for filing

of the suit ?

(iii) Is the suit barred by the principle of estoppel, waiver and acquiescence ?

(iv) Is the suit barred under the provisions of specific relief Act ?

(v) Are the plaintiffs entitled to decree for specific performance of contract for sale on the basis of Baibiyana deed dated 25.10.85?

(vi) Are the plaintiffs entitled to get possession on the suit land ?

(vii) Are the plaintiffs in the alternative entitled to get refund of the advanced money amounting Rs.50,000/- with interest and damage ?

(viii) Are the plaintiffs entitled to the reliefs as claimed in the plaint ?

(ix) To what other relief or reliefs, if any, the plaintiffs are entitled ?

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7. While deciding Issues No.5 and 6 the learned trial court found that the condition regarding payment of Rs.1,25,000/- by 30.1.1986 was inserted in the deed of agreement only at the instance of the defendants without the knowledge of the plaintiff and further that the stand of the plaintiff was correct that without a declaration from the court that the land in question belongs to the defendants how and why he would have invested such a huge amount for purchase of the

land. So, he has rightly not invested any amount for the same land. Therefore, the plaintiff was justified by giving notice to the defendants for making the land free from litigation and then get the deed of sale executed . The trial court also observed that although it has been established and proved that there was no clause for payment of Rs.1,25,000/- on or before 30.1.1986 but assuming for argument sake that there was an agreement for payment of said amount still the plaintiff was not under the obligation to pay the same because he came to know about the pendency of title suit prior to 15.1.1986. The trial court also found that the plaintiff was ready to purchase the land even before 30.1.1986 on payment of rest consideration amount if the defendants compromise the case with the plaintiff of Title Suit No.252 of 1985 or that case was decided in favour of defendants. The learned court below also found that the plaintiff had sufficient money to purchase the land as such he is entitled for a decree for specific performance of contract. On these findings the learned court below decreed the plaintiff's suit.

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8. The learned Senior counsel Mr.Dhruv Narayan appearing on behalf of the appellant submitted that the learned court below has wrongly decreed the plaintiff's suit for specific performance because there are overwhelming evidence on record to show that the plaintiff was never ready and willing to perform his part of the contract till the disposal of Title Suit No.252 of 1985. The learned counsel further submitted that even

if the total case of the plaintiff is relied upon then also he is not entitled for specific performance because of the fact that he always asked for a guarantee of the title of the defendant prior to execution and registration of the sale deed which implies that he was never ready and willing to pay the balance consideration amount and get the sale deed executed and registered. The plaintiff always instigated the defendants to perform a condition which was not agreed between the parties and thereby put the said condition precedent for performance of his part of the contract. The learned counsel further submitted that the grant of decree for specific performance of contract is discretionary and in view of the above facts the plaintiff was not entitled for the decree. On these grounds the learned counsel submitted that the impugned Judgment and decree are liable to be set aside.

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9. On the other hand, the learned counsel, Sri Singh, appearing for the respondents supported the reasoning of the learned court below and submitted that the learned court below has rightly decreed the plaintiff-respondents' suit. The learned counsel further submitted that prior to entering into agreement the defendants had appeared in the title suit but intentionally did not disclose the pendency of the suit and entered into the agreement. In such circumstance, the plaintiff was justified for not paying the balance consideration till the dispute between the parties in Title Suit No.252 of 1985 was settled. The learned counsel further submitted that time was not

the essence of contract and, moreover, the condition regarding payment of Rs.1,25,000/- within 30.1.1986 was inserted without the knowledge of the plaintiff and prior to 30.1.1986 the plaintiff came to know about the pendency of Title Suit No.252 of 1985 but even then the plaintiff sent legal notice to the defendants informing him that he is keeping the balance consideration amount and ready to pay and asked the defendants to settle / compromise Title Suit No.252 of 1985 and execute and register the sale deed but the defendants failed to do so, hence, the suit was filed. On this ground the learned counsel submitted that the impugned judgment and decree are not liable to be interfered in this first appeal.

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10. In view of the above rival contentions of the parties the points arise for consideration in this appeal is as to whether the plaintiff respondent was always ready and still ready and willing to perform his part of the contract and entitle for a decree for specific performance of contract and whether the impugned judgment and decree are correct.

FINDINGS

11. In this case the execution of the deed of agreement dated 28.10.1985 is admitted. The consideration amount of Rs.3,42,400/- is also admitted fact. The receipt of Rs.50,000/- as earnest money is also accepted. So far payment of Rs.1,25,000/- within 30th of January,1986 is concerned, according to the defendants it was also agreed between the

parties that if it is not paid within 30.1.1986 then the earnest money shall be forfeited . According to the plaintiff this payment of Rs.1,25,000/- within 30.1.1986 was not agreed upon between the parties and the forfeiture clause has been added subsequently.

12. The learned counsel for the appellant submitted that even if it is stipulated in the agreement that Rs.1,25,000/- was to be paid within 30.1.1986 then also time was not the essence of the contract and because of nonpayment of Rs.1,25,000/- within that period the earnest money cannot be forfeited. To the contrary the learned counsel for the respondent submitted that time was essence of the contract.

13. From perusal of the deed of agreement Ext.2 = Ext.A dated 28.10.1985 it appears that there is a clause regarding payment of Rs.1,25,000/- by 30.1.1986. So far forfeiture clause is concerned it appears that it is in different hand writing. Now therefore, it is necessary to consider as to whether fixing of time for payment of Rs.1,25,000/- will mean that time was essence of contract.

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14. In Govind Prasad Chaturvedi vrs. Haridutt Shastri; AIR 1977 SC 1005 the Hon'ble Supreme Court has held at page 1007 – 1008 as follows:

" It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the

essence of the contract. When a contract relates to sell of immovable property, it will normally be presumed that the time is not the essence of the contract. (Vide Gomalthinayagam Pillai vs. Pallaniswami Nadar, (1967) 1 SCR 227, 233) : (AIR 1967 SC 868 at P.871). It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidences by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract."

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14. In the case of **Indira Kaur vrs. Sri Shivlal Kapur ; AIR 1988 SC 1074** at paragraph 6, the Hon'ble Supreme Court has held as under :

" The law is well settled that in transaction of sale of immovable properties, time is not the essence of the contract."

15. In the present case from perusal of Ext.2 it appears that in the first portion of the agreement there is a clear recital that the balance consideration amount of Rs.2,92,400/-

shall be paid at the time of registration of the sale deed. In the last portion it is mentioned that Rs.1,25,000/- was to be paid by 30th January,1986. The sale deed was to be executed and registered within 30.1.1986 then certainly there should not have been any stipulation that the balance consideration of Rs.2,92,400/- was to be paid at the time of registration. As has been discussed above the Hon'ble Supreme Court has held that when a contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract. Therefore, to rebut this presumption there must be evidence and circumstances which are sufficiently strong. In the present case in the deed of agreement the language used are not such as to indicate any unmistakable term that the time is the essence of the contract. So far the payment of balance consideration is concerned there is ambiguity. I, therefore, find that the time was not the essence of the contract. However, merely because time was not the essence of the contract on that ground alone the plaintiff is not entitled for a decree for specific performance of contract unless the plaintiff proves his continuous readiness and willingness to perform his part of the contract.

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16. So far as the readiness and willingness is concerned at paragraph 20 of the plaint there is pleading to the said effect. Now let us see the evidence in support of the same. P.W.4 Ram Nandan Singh is the plaintiff no.1. At paragraph 5 as stated that although payment of Rs.1,25,000/- by 30.1.1986 was

inserted subsequently then also at that time he was ready to get the sale deed executed if the title suit would have been compromised. In paragraph 6 also he has stated that prior to 30.1.1986 he was ready and willing to pay the consideration and get the sale deed executed, had the Title Suit No.292 of 1985 been compromised. He has also stated that he is still ready. At paragraph 17 he has clearly admitted that on 13.1.1986 he came to know about the pendency of title suit with respect to the land and had the title suit been not pending he would have paid Rs.1,25,000/-within 31.1.1986.

17. The plaintiff has also adduced documentary evidences. Ext.1/A is the legal notice on behalf of the plaintiffs to the defendants dated 16.6.1986. It may be mentioned here that the last date for execution and registration of the sale deed was 30.6.1986. In this legal notice at paragraph 10 it has been mentioned as follows:

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" That under the aforesaid circumstances my clients sent lawyers Notice to you and requests you to settle the dispute between you and your agnates before 30.6.86 and make the property covered by the Baibyana deed free from all defects of title and dispute so that my client will be in a position to pay balance amount of consideration money and

get the sale deed executed and registered and you were further requested to inform my clients whether the dispute has been settled between you and your agnates."

18. Likewise in Ext.1/B the legal notice dated 25.9.86 in paragraph 8 and Ext.1/C the legal notice dated 14.7.1987 in paragraph 8 have reiterated the same demand and requested the defendants to settle the dispute in title suit so that they will pay the balance consideration to the defendants.

19. In view of the above evidences it is clear that the plaintiffs purchasers were not willing to make the part payment of consideration amount without fulfillment of a condition, i.e., till the settlement of Title Suit No.252 of 1985 which was not the condition mentioned in the agreement. In other words this condition was contrary to the agreement. From discussion of the above evidences it is clear that the plaintiffs were asking for a guarantee of title from the defendants although after full satisfaction of their title they entered into the agreement. In the agreement itself the defendants mentioned the details as to how they are the owners. In similarly situated case in a decision reported in **Vol.XIV L.R. Indian Appeals. P.173 ; Babu Bindeshwari Prasad vrs. Mahanth Jai Ram Gir,** the Judicial Committee held that guarantee of title by the defendant had never been within contemplation of the parties.

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Consequently, no case was made for exercising the discretionary power of the court to grant specific relief. In the similar line the Hon'ble Supreme Court in **AIR 1993 SC 1742 ; Smt. Chand Rani vrs. Smt.Kamal Rani** has held that the plaintiff was not ready and willing to perform his part of the contract. In that case it appears that the plaintiff was insisting for possession.

20. In the present case, at our hand, from the evidences discussed above it is clear that during the pendency of the Title Suit No.252 of 1985 the plaintiffs were not ready to pay the balance consideration amount and get the sale deed executed. In clear terms in the evidences and the legal notice it is stated that unless the title suit is compromised they will not pay the consideration amount.Therefore, it appears that there is only averment in the plaint and in the notices that the plaintiffs were ready and willing to perform their part of the contract. But mere assertion in the plaint is not sufficient. The readiness and willingness must be reflected from the conduct of the plaintiff. As discussed above it appears that the plaintiffs were at least not ready till the disposal of the Title Suit No.252 of 1985 to pay the balance consideration amount and get the sale deed executed. Therefore, the plaintiffs were not always ready and willing to perform their part of the contract.

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21. From perusal of the impugned judgment and decree it appears that the learned court below has not

considered the legal position as has been settled by the Hon'ble Supreme Court and the Hon'ble Judicial Committee. The learned court below has not considered these parts of the evidences of the plaintiff no.1 and the legal notices and the effects thereof. I, therefore, do not agree with the findings of the learned court below.

22. In view of my above discussion I find that the plaintiffs failed to prove that they were always ready and willing to perform their part of the contract as such are not entitled for a decree for specific performance of contract. The findings of the learned court below on this point is, therefore, reversed.

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23. In this case it is admitted fact that Rs.50,000/- was received by the defendants as earnest money. It has been held that the plaintiffs are not entitled for the specific performance of contract. I, therefore, hold that the plaintiffs are entitled to get back the earnest money of Rs.50,000/- with simple interest at the rate of 6% per annum from the date of institution of suit.

24. In the result this appeal is allowed. The impugned judgment and decree are modified to the extent that the plaintiffs are entitled for recovery of Rs.50,000/- with simple interest @ Rs.6% per annum from the date of suit. The main prayer for specific performance of contract is refused thus the suit is decreed in part.

In the facts and circumstances the parties shall bear their own costs.

(Mungeshwar Sahoo)

The Patna High Court.
The 5th August, 2010.
AnilKr.Sinha,
Secretary/N.A.F.R.

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